

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-1070

To be argued by
LAWRENCE STERN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA,

Appellee,

-against-

VICTOR CUMBERBATCH.

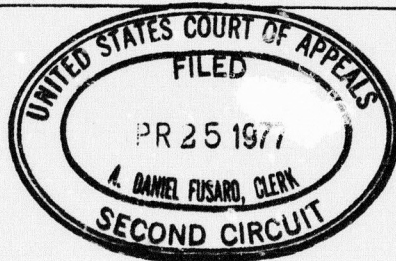
Defendant-Appellant
-----X

Docket No.
77-1070

B
P/S

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
UNITED STATES OF AMERICA, :
 :
Appellee, :
 : Docket No.
-against- : 76 Cr. 1076
VICTOR CUMBERBATCH, :
 :
Defendant-Appellant. :
-----X

ISSUES PRESENTED

1. Whether Indictment 76 Cr. 1076 should be dismissed because it violates the letter and spirit of the Interstate Agreement on Detainers, the Constitutional rights to due process of law and against double jeopardy, the government's guidelines against multiple prosecutions for the same offense and the legislative intention of 18 U.S.C. §924.
2. Whether, since the government's evidence that appellant carried a firearm was incompetent and insufficient and since no evidence was introduced to show unlawfulness under a city ordinance or that the bank was federally insured on the day of the robbery, the conviction must be reversed.
3. Whether prosecution under Indictment 76 Cr. 1076 violated the Plan for Prompt Disposition of Criminal Cases and appellant's rights to a speedy trial and due process of law.
4. Whether appellant was deprived of a fair trial, the rights to cross-examination and to present a defense, by prejudicial, restrictive rulings by the trial judge, by the government's withholding of relevant evidence, by remarks of the judge deprecating counsel and the defense and by the Court's charge to the effect that the prosecution had proved its case.
5. Whether the in-court identification was unnecessarily and impermissably suggested and irrevocably tainted by allowing it, over appellant's objection, without an in-court line-up, by the prior showing of the the bank surveillance photos, and by the pre-trial exhibition of appellant's photograph.
6. Whether, since appellant's decision not to testify was based on the prosecutor's permitted use, over his objection of a prior conviction that has since been reversed and dismissed, and since his sentence was based on that conviction and other improper criteria, the judgment should be reversed or the sentence remanded for reconsideration.

STATEMENT PURSUANT TO RULE 28(a)(3)

A. Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York [Palmieri, J.] rendered on February 10, 1977, convicting appellant, after trial by jury, of the crimes of conspiracy (18 U.S.C. §371) and carrying a firearm during the commission of a felony (18 U.S.C. §924(c)(2)), and sentencing him to consecutive prison terms of 5 and 10 years respectively, both terms to run consecutively to a State sentence appellant was serving at the time.

Timely notice of appeal was filed.

Appellant is presently incarcerated; the State conviction has been reversed and the indictment dismissed.

B. Statement of Facts

1. Pre and Post-Trial History of the Prosecution

On April 12, 1973, an indictment (73 Cr. 319), was filed in the Southern District charging appellant, Raul Estremera, Pedro Monges, and Oscar Washington, with the robbery of a bank, aiding and abetting, assault with dangerous weapons, "to wit, firearms," during the commission of the robbery, and larceny from the bank on February 9, 1973, in violation of 18 U.S.C. §§2113(a), 2, 2113(d), 2, and 2113(b), respectively.

On October 25, 1973, a writ of habeas corpus ad prosequendum was signed by Judge Lloyd F. MacMahon of the Southern

District directing the Warden of New York City Correctional Institution for Men at Rikers Island to produce appellant in the Southern District the next day for arraignment on the indictment and further ordering,

immediately after the said Victor Cumberbatch shall have pleaded to said indictment, that you return him to the said New York City Correctional Institution.

The writ was honored and satisfied, and after pleading not guilty in the Southern District, with Legal Aid as counsel, appellant was returned to Rikers Island.

On December 18, 1973, the government filed a notice of readiness for trial.

On May 23, 1975, the trial of co-defendant Raul Estremera was completed in the Southern District, and appellant's trial in New York State ended on or about June 28, 1975.

On July 7, 1975, the United States Attorney wrote a letter to Judge Kevin Duffy, to whom the trial had been assigned, asking for a conference to clarify appellant's representation. At the time of the letter, appellant was represented by the Legal Aid Society on the federal indictment and Robert Bloom on the State case. Appellant was sentenced on the State case in August, 1977.

On September 9, 1975, the conference was held, and Mr. Bloom was appointed. The Judge told appellant that the Judge's schedule precluded trial at least until mid-November (minutes of 9-9-75 at p.8). Appellant was again brought to the Southern District for this conference pursuant to a writ of habeas corpus ad prosequen-

dum and returned to New York.

On April 13, 1976, the United States Attorney wrote to Mr. Bloom and notified him that Judge Duffy had set June 7, 1976, as the trial date.

On April 26, 1976, Mr. Bloom wrote to Judge Duffy and explained that he had already been committed to two back-to-back murder trials which would run from April 28 to the end of June. He suggested that there might be space in mid-May between the two murder trials and asked that the case be tried at that time either by Judge Duffy or another available Judge.

In May, 1976, a third writ of habeas corpus ad prosequendum brought appellant to the Southern District from Auburn Correctional Facility. There had been no response to Mr. Bloom's letter of April 26, 1976; on June 7, the case was adjourned to July 13, 1976. On June 10 and 11, 1976, Mr. Bloom requested of the United States Attorney that appellant remain at the Metropolitan Correctional Center so that he could prepare with him for trial. The AUSA refused to request appellant's continued presence in the Southern District because the Marshall was anxious to return appellant to the State due to overcrowded conditions at MCC. On June 14 and 15, 1976, Mr. Bloom spoke with Judge Duffy's chambers and requested that the Judge direct appellant's continued presence in the Southern District. This request was refused and appellant was returned to Auburn.

Mr. Bloom's trial was not finished by July 13, and the case was adjourned sine die at that time.

On August 12, 1976, appellant moved to dismiss indictment

73 Cr. 319 because of violations of the Interstate Agreement on Detainers (18 U.S.C. App). The government filed opposing papers in September and Judge Duffy denied the motion without opinion on September 18, 1976.

On October 26, 1976, this Court decided United States v. Mauro, dismissing indictments on the basis of violation of the Interstate Agreement on Detainers.

On November 23, 1976, a second, "supplementary" indictment [76 Cr. 1076] was filed charging appellant with conspiracy to rob a bank in violation of 18 U.S.C. §2113(a) [18 U.S.C. §§371] and with carrying a firearm during the commission of a felony [18 U.S.C. §924(c)(2)] on February 9, 1973, with respect to the same bank as charged in the former indictment.

On December 2, 1976, a plea of not guilty to the second indictment was entered by the Court without appellant's presence.

On December 8, 1976, appellant filed a motion to dismiss the second indictment. Counsel apparently had not been informed that the earlier motion to dismiss the first indictment had been denied by simple endorsement on the papers, because in his affidavit on the second motion addressed to the second indictment he described the first motion as "presently pending before this Court." In the second motion, the grounds raised were the original violation of the Interstate Agreement on Detainers (IAD), collateral estoppel, speedy trial, and the misapplication of 18 U.S.C. §924 to a crime already carrying additional firearm penalties (United States v. Eagle, 539 F.2d 1166 (8th Cir. 1976)).

On December 13, 1976, jury selection was scheduled to begin before a new Judge, the Honorable Edmund L. Palmieri. All

parties were present. The Court announced with respect to the dismissal motion, "I have reserved decision and we'll go on with the trial" (minutes of 12-13-76 at p.5). The government announced it was prepared to proceed on both indictments, while "recogniz[ing] that the first indictment is vulnerable to challenge under Mauro" (Id. at 8). When the government refused to consent to dismissal of the first indictment, the Court ordered,

I grant Mr. Bloom's motion to dismiss the indictment filed against Cumberbatch on April 12, 1973, Indictment 73 Criminal 319, with prejudice. Therefore this morning we will proceed with respect to the '76 indictment, and I will reserve decision on the motion to dismiss the '76 indictment.
(Id. at 9)

On December 16, 1976, the day the jury returned the verdict of guilty, Judge Palmieri rendered a written opinion denying dismissal of the second indictment. Notwithstanding having already dismissed the first indictment on the strength of Mauro and the IAD, the Court wrote,

While it appears that the defendant is correct in asserting that the Government's purpose in reindicting Cumberbatch was to salvage its prosecution in the face of the Mauro holding, the facts of this case suggest that this defendant should not be permitted to avail himself of the benefits of the IAD.

(slip. op. at p.5)

Appellant's speedy trial arguments were avoided by the invocation of Rule 11(e) of the Southern District Plan which, the Court held, made dismissal discretionary (Id. at 9) and Rule 5(d) which, the Court held, exempted the second indictment from the governance of the Plan (Id. at 10).

The Court did not deal in its written opinion with the Eagle question of misapplication of 18 U.S.C. §924. At the start of the trial, however, it orally denied dismissal of Count 2 of the second indictment on the grounds that, "that case stems entirely from the statements of one member of Congress, a Mr. Poff," and because the Court "preferred to follow the numerous decisions cited in the United States Attorney's Brief." Counsel argued that in all the cases cited by the AUSA, the issue raised here and in Eagle was not before the appellate courts. The Court then relied on the absence of a Second Circuit decision: "until the Second Circuit tells me I am wrong, I prefer to follow my own views as to what is correct" (37-39).

On January 17, 1977, appellant filed a motion to set aside the verdict and to dismiss the indictment and responded to the Court's written opinions of December 16. Counsel specifically excepted to the Court's acceptance of "the government's bald assertion that the defendant requested lengthy delays and delayed the trial of this matter. That is categorically untrue." Counsel asked that the Court at least hold a hearing on the pre-trial facts. During oral argument on this motion, the Court stated that it regarded Mr. Bloom's other trial commitments as enough cause to deny appellant the benefits of the IAD.

You raised your additional professional commitments as a basis for avoiding, preventing, rendering impossible the holding of this trial before Judge Duffy.

(606)

Mr. Bloom replied,

What happened in fact was, I was assigned on a given date, the date of which I don't have before me. The next communication I received, your Honor, from the court was at the time when I was on trial...I indicated that

to Judge Duffy. The trial was soon to terminate, and I indicated that to Judge Duffy. What happened thereafter is Judge Duffy set down the trial for a given date without consulting me. That date was sometime, I believe, in June, 1976. As soon as I got this communication, I indicated to Judge Duffy that I was presently on trial at that time, which was around April of 1976, that I would be terminating that trial within a week or two, and that at the time he had selected I would likely be on trial with another case. I asked if the trial could be accelerated, not delayed, but accelerated to a time after the trial I was presently engaged in. And if Judge Duffy could not do that, I asked him to see if there was another Judge in the Court available who would accomodate that schedule...What happened is Judge Duffy felt he could not because of his schedule meet what he felt to be the time problem, and he did find a judge...you got it, cases are transfered from one to another.
(606-607)

The Court stood on its opinion.

In his post-verdict argument in response to the Court's written opinion, appellant also asserted that the government was precluded by its own policy against multiple indictments for the same transaction, and by due process and analogous double jeopardy considerations from bringing the second indictment against appellant in this case (610-611).

2. The Trial

Counsel asked the Court to preclude cross-examination of appellant on the August, 1975 New York State robbery conviction. The Court reserved decision, but apparently never specifically ruled (17-18, 46). Appellant did not testify. The conviction was reversed by the Appellate Division of the State of New York after the sentence in this case. People v. Cumberbatch ____ A.D.2d ____ (1st

Dept., March 24, 1977).

Outside the presence of the jury, for the purpose of a Simmons hearing, James Bolla, manager of the First National City Bank branch, testified that the bank was robbed on February 9, 1973, and that the New York police showed him 12 photographs on March 5, out of which he picked a photo of appellant as one of the robbers, the man in the bank surveillance photos wearing a hat and cape and carrying a gun (79, 91). He'd been shown photos by the FBI before that, and was shown photos by them after that (112). Only six of the photos shown to him were produced in Court, and these were shown to him also in May, 1976, and a week before the trial (91). He recalled signing the back of the photograph of appellant, but there was no signature on the one in Court (107). He also recalled signing a statement prepared by the police (108-109)*

Although only four robbers were identified, Mr. Bolla told the FBI on the day of the robbery that there were five (96). He told them the man with the cape was 29, clean shaven, light-skinned and fluent in Spanish. He did not mention a moustache. The man with the cape in the photos had a moustache, was dark-skinned, and Mr. Bolla testified at trial that the man spoke only some words in Spanish (97-102).

Appellant was 20 years old at the time of the robbery and

* Appellant argued he was deprived of the right to effective cross-examination by the absence of this statement, which the government apparently could not find (156-162).

spoke no Spanish (See testimony of his mother Gladys Atkins at 384-386).

A New York City Police Officer John Brown showed the photos to Bolla. He did not lay the 12 photos out in rows on a desk as Bolla had described, but handed them to Bolla to peruse (151).

Following the Simmons hearing testimonies of Mr. Bolla and Mr. Brown, appellant asked for an in-court line-up during the expected in-court identification to be made by Mr. Bolla. The Court denied this request calling the line-up unnecessary and the request too late. Counsel explained that he had requested a Simmons hearing during a pre-trial conference on September 9, 1975; the Judge there had assumed such would be held prior to trial if there were photospreads in the case. Counsel explained further that he needed to know what the identification witnesses would say with respect to the pre-trial identification procedures and their opportunities to observe before deciding on the line-up request (123-129). Over objection, the prosecutor was permitted to argue in his rebuttal summation that appellant could have been seated anywhere in the courtroom during Mr. Bolla's testimony. The Court said in open court, "It is a perfectly valid argument" (486-488).

Mr. Bolla testified essentially as he had on the hearing (194-205). In addition, he testified he'd looked at the man in the floppy hat for only 30 seconds (95) and he admitted that he had failed to mention to the FBI that one of the robbers wore a cape (205), and he gave conflicting testimony about whether he'd actually seen who hit the Assistant Manager, Mr. Randall, on the head (174, 206). He repeated that he had signed a statement upon identifying appellant's

photograph on March 5 (219), and he added something he hadn't mentioned on the Simmons hearing - before being shown the photographs, he was shown the bank surveillance photographs on two to four different occasions (224). On the basis of this latter revelation together with the other circumstances, appellant moved to strike Mr. Bolla's testimony as irrevocably tainted. The Court ruled, "It is not a taint. It has nothing to do with the impermissible suggestion of Simmons..." (373-74).

Appellant's objections to Mr. Bolla's testimony that the bank was insured by the FDIC and to a FDIC certificate without evidence it was in effect at the time of the robbery on the grounds of incompetence and no foundation respectively, were overruled (187-189). Appellant argued in later motions to dismiss that the government had failed to prove this element (See motion to dismiss of January 14, 17, 1977, and pp.620-621). These motions were denied (626-627).

Albert Randall, the Assistant Manager of the bank, testified that he was hit by one of the robbers, Oscar Washington, while he was at his desk, and by "someone" when he was laying on the floor. He could only identify Washington. He testified that Washington carried newspapers, but he didn't mention this to the FBI on the day of the robbery (234-244).

Notwithstanding his own characterization of the extended description of Mr. Randall's injuries and continued medical treatment as "peripheral," the Court permitted it, over appellant's objection (238).

When Mr. Randall was asked if he'd given a detailed report to the FBI on the day of the robbery and was shown the report, the Court interrupted with, "That reports [sic] represents part of the documentation provided to you by the government for cross-examination purposes,

but it is not admissable in evidence" (275).

The guard, Rudolfo Romero, picked out a photograph of a man who gave the impression of being tall, skinny "like the guy with the floppy hat (259-260).*

Robert S. Scroggie, a firearms classification agent for the Bureau of Alcohol Tobacco and Firearms, testified, over objection, that the instrument in the hands of the man with the cape and floppy hat in the bank surveillance photos appeared to be a Commander Mark 3, .45 calibre carbine. Over objection, he testified further that purely on the basis of the photograph, his opinion was that the instrument was "capable of firing a projectile by the action of an explosive" (268, 265-268). Replicas of long guns are made, but he'd never seen a replica of the gun he'd named (272).

Counsel objected that there could be no real foundation for testifying from the bank surveillance photographs that a particular instrument was a particular weapon, that it was capable of firing a projectile, and that the instrument in question was not a replica or mock weapon (269). Counsel moved to strike the Scroggie testimony (278, 388). The Court denied the motions and objections and itself examined the witness and restated the testimony (274, 279-281):

THE COURT: But this one is a firearm which does not have any replicas manufactured which are in commerce, is that right?

THE WITNESS: None that I know of.

MR. BLOOM: I object to the use of the word

* According to the AUSA at side bar, Mr. Romero could no longer recall the photograph he identified when shown a spread by NYPD Officer Brown. The FBI never showed him a photospread containing appellant's photo (260-61).

firearm, if Your Honor please,
in Your Honor's questions.

THE COURT: Can you suggest a word that I
should use?

MR. BLOOM: Instrument.

THE COURT: Well, I decline to use it.
(274)

The Court went on, over objection, to ask if Mr. Scroggie could say with certainty that "the firearm which you see in exhibit 54 was not capable of firing a projectile?" (279-280, emphasis added). He replied, "I cannot say [sic] that. It appears to be in good shape [sic] and functioning" (280). Then, Mr. Scroggie directly contradicted himself and testified that he could not tell if the instrument in the photograph was capable of firing a projectile (280-281).

The Court had earlier overruled objection to Mr. Bolla's characterization of the instrument carried by the man in the floppy hat as a sub-machine gun or automatic weapon (182), and later he would charge the jury,

These guns were used. Randall said that he was pistol whipped, and struck with the barrel of this carbine while on the floor, but no firearm was fired. It is not necessary for the government to prove that it was. You are entitled to infer that the weapon was a firearm from all the surrounding circumstances, including the use and the appearance of the weapon and the testimony of the firearms expert...He testified that he couldn't say from the photographs whether the gun was operable...the government does not have to prove that the gun was operable...I have in my hands exhibit 54, which shows one of the robbers in profile, holding, extending the gun. You can see the whole contour of the gun in this photograph. It is one of the exhibits on which Mr. Scroggie relied.
(535-536)*

* When counsel objected to this charge (569-570, 575-576), the Court supplemented his instructions with, "I am making humble suggestions as to what I think you would find if you look at them [the photographs]..."

Mr. Scroggie testified further that he had no way of knowing whether the instrument was operable or would fire a projectile, but from the "appearance of the photograph" it is designed to fire a projectile (276-277). He had no way of knowing if it was a replica or of what it was made (277). He arrived at his opinion by comparing the photograph with the picture of the Commando Mark 3 in an advertisement and from his experience in handling the Commando Mark 3.

Counsel for both parties stipulated that the New York City Firearms Control Board did not issue a permit to appellant to carry this particular weapon (336C).

A series of witnesses testified about two automobiles, motors running, parked the wrong way on Crimmins Avenue near the bank. An FBI agent, James Murphy, found them (281-283). Louis Robinson identified one of them, an Oldsmobile, as his car, missing a couple of days before the robbery (290). Leroy Irvin, who lived on Crimmins Avenue, saw a woman and six to eight men with duffel bags and gun stocks get out of the cars (284-285).

Appellant's prints were found on several pages of a copy of the Daily News containing a story about Daniel Ellsberg, and on a copy of the newspaper Mohammad Speaks. (See testimony of FBI agent James Jenkins at 336D-360 and testimony of NYPD Detective Diallo Bennett at 314-318). FBI agent John J. Janson testified he found the Mohammad Speaks on top of trash in a can behind the tellers cage (295-296). FBI agent Robert M. McCartin testified he found the Daily News on the front floor, passenger side of the Oldsmobile (304-307).

you alone will decide...I do not, by anything I said, want to take that function from you" (582).

Agent McCartin made a written report of his activities in the case in which he stated that the newspaper was found in a Buick (309). Based on this discrepancy, and on counsel's personal knowledge of the agent's past functions, counsel attempted to cross-examine the agent on the possible bias of the agent against appellant that might have motivated the agent to lie about the location of the newspaper. Objection was sustained, however, and counsel's offer of proof, that Agent McCartin had been associated with many cases labelled by the government as involving the Black Liberation Army, was rejected. The Court ruled that before counsel could elicit the bias, appellant would have to take the stand and admit to being a black militant (311-312). The Court sustained objection to the questions whether the Agent's work had involved people he believed to be black militants, whether he was involved in the arrest of Angela Davis, what were his feelings about militants, whether he believed appellant was a black militant, and whether there were any orders with respect to people labelled by the FBI as black militants (326-328). The Court took over the examination and asked the witness twice if he was following any secret orders in this case, whether he entertained any prejudices against appellant, and whether the witness had testified to everything he'd done in the case. The witness replied in the negative to the former two questions, and in the affirmative to the latter (326-328). The Court refused to permit counsel to ask about the other cases to which he had referred (330-331).

Upon further cross-examination, the agent admitted that he had in fact done other work on this case. He had applied for a search warrant on February 15, 1973, for a house in Kings County related to the bank robbery. He had sworn to the affidavit, but the information

had come from someone else. He turned the warrant over to another agent, and did not execute it himself (334-236).

Although the Court, having reviewed the FBI file on the case for any further information concerning Agent McCartin's involvement, refused the file to counsel and ruled there was nothing of relevance in it (408-409), in the motion to set aside the verdict, counsel produced evidence that Agent McCartin was lying about his limited involvement in the case and on the search warrant. The evidence consisted of the return on the search warrant, which was signed by Agent McCartin and stated that he had in fact executed it. The motion to set aside was denied on this ground as collateral (625).

With respect to this issue the Court had interrupted counsel's opening statement to remark:

You are attributing motives to a witness, or perhaps a group of witnesses, who have not yet testified and it is not your function to attack the credibility of anybody in an opening statement...For you to make a remark like that is entirely out of order and I direct the jury to disregard it.*

(169, 169-170)

In his charge, duly objected to (564, 575, 579), the Court said

The defense counsel also suggests that the FBI Agents Janson and McCartin, planted these newspapers...to make a false case against the defendant. That is a very serious charge, ladies and gentlemen...If you believe that the FBI Agents ...have sought to frame this defendant, then I suggest that you disregard all of their testimony (548)...If FBI Agents Janson and McCartin lied as the defendant says they did, how were they able

* Counsel said, "...the evidence will show the FBI using procedures that we have come to know decided that they were going to make sure Mr. Cumberbatch got convicted of this crime" (169).

to produce these fingerprints of Cumberbatch for submission to the FBI fingerprint section in Washington, D.C. by March 12th or 15th? (550) ...If they were planted on Jenkins, by these perjurious agents, assuming they were perjurious, did Janson and McCartin have some way outside of the FBI office of determining these were prints, and whose they were? It is up to you to determine whether the serious charge of framing this defendant which has been made against FBI Agents Janson and McCartin, is irresponsible, or whether it is supported by any credible evidence in the case... (551)

The Court went on to say that if the jury believed the newspapers were found where the agents said they were found, "they constitute links between the defendant and the bank robbery" (551).

The Court also permitted, over objection, the tags made by the fingerprint expert, Jenkins, to go to the jury. Although the Court told the jury that the tags were not evidence, the jurors were permitted to see the tags which labelled the newspaper as coming from an Oldsmobile, thereby corroborating McCartin's testimony (341-343).

Outside the presence of the jury, the Court instructed the United States Attorney to "clear up" the Buick-Oldsmobile contradiction, because, "Mr. Bloom has made a very good point...I was very confused and if I was confused, I think this jury must be confused as to whether he found it in the very car he followed...." (324).

At the close of the evidence counsel's motions for a dismissal and judgment of acquittal were denied (391-398).

During the prosecutor's summation, the Court twice admonished defense counsel in open court that he was not making "legal objections" to the AUSA's comments on the evidence (418, 426). During defense counsel's summation, when the prosecutor objected to counsel's comments on the evidence, the Court admonished counsel that he could not

comment on the light=dark printing in the photographs because he was not a photography expert (446), that he could not comment on the government's burden of proof with respect to the alleged weapon (474-475), and that he could not argue to the jury that they could find appellant not guilty of count 2 even if they found him guilty of count 1 (476-477), and that counsel should "try to bring your remarks to a close and let Mr. Epstein have his rebuttal so we can excuse the jury for the day...you are not helping anybody except to keep us all here without any purpose" (477).

During the prosecutor's rebuttal, counsel objected to remarks that he could have asked appellant's mother whether the man in the bank surveillance photo was her son. This objection was overruled (491). Also denied was appellant's motion for a mistrial on this ground and on the prosecutor's comments on appellant's failure to elicit certain testimony from the FBI agents, especially in view of the Court's preclusion of examination of the former, and on the overall hostility of the trial judge (491, 500-501).*

In addition to the objections to the Court's charge already noted supra, counsel objected (570-573) to the Court's charge that, "you may conclude that the possession of this particular, if you conclude it was a firearm as described, was possessed unlawfully at the time of this bank robbery" on the basis of the Administrative Code of New York City §436-6.6. That ordinance, which the Court quoted to the jury, makes "unlawful" the possession of a rifle or shotgun without "a permit for the possession and purchase of rifles and shotguns" (537).

* It should be noted that the Court at one point admonished counsel for saying "good morning" to witnesses, and for "demonstrating amusement" (320-321).

Also objected to (579), was the charge,

We are not concerned here with the Ellsberg case, which has been mentioned here, unfortunately, two or three times...You must not permit yourselves to be diverted from the evidence in the case into matters which are not before you and not presented to you by the evidence.

(556-557)

Objection (581) was taken to the portion of the charge which alluded to the facts in the case as a "mosaic."

When you draw away from it you can discern a relationship between the colors and determine the purpose of the artist...you start with the facts that you think are either undisputed or relatively undisputed and work from those facts to the more troublesome facts.

(560-561)

When counsel objected to the charge that all the robbers wore gloves and that the surveillance photos began immediately at the start of the robbery (582, 586) the Court supplemented its charge with a direction only that "Mr. Bloom asked me" and "Mr. Bloom wishes me" to state that these facts are not conceded (582-583).

After the verdict of guilty on both counts, the Court expressed a desire to sentence appellant the next day without a probation report or, if there was objection, on the basis of the borrowed State probation report (591-592).

On the day of sentence, February 10, 1977, oral argument was entertained on appellant's motion to set aside the verdict, filed January 17, 1977, which among other things already discussed asserted the absence of sufficient evidence on the "firearm", and "unlawfulness", and the FDIC, and that the indictment was fatally defective as itself founded on less than sufficient proof Also argued and denied was the issue of restriction on the cross-examination of the FBI agents.

Counsel asked the Court to impose a sentence under the

Youth Corrections Act. There followed a discussion of appellant's prior 1975 State conviction of robbery, which has since been overturned (631-639). The AUSA argued that appellant should receive the maximum sentence, because his codefendants received more time under the higher maximums available on the indictment dismissed against appellant (631). The Court then opened,

It is my considered conclusion that he would not benefit from any sentence under the Youth Offender Act. This act was intended to serve the needs of young offenders who are considered to be tractable, malleable, who lend themselves to rehabilitation. This is not the case with someone like Mr. Cumberbatch who is a recidivist...This crime was a very serious crime. It's defendant's propensity for violence was evident not only by this crime, but by his state conviction.

(640-641)

I am shocked to think that these statutes carry such penalties. Here is a conspiracy to commit a bank robbery which carries a maximum penalty of five years, and the second count, carrying a firearm during the commission of a felony, carries a maximum penalty of ten years...Instead of all these young people out of law schools tinkering with the delicate machinery of the courts, it seems to me an obvious task for them would be to look at the entire set of penalties...conspiracy to commit a bank robbery should carry a much higher maximum penalty, certainly much higher than the other count.

(644-645)

The Court imposed sentences of 5 and 10 years to run consecutively with each other and with appellant's now abrogated State conviction.

ARGUMENT

POINT I

INDICTMENT 76 Cr. 1076 SHOULD BE DISMISSED BECAUSE IT VIOLATES THE LETTER AND SPIRIT OF THE INTERSTATE AGREEMENT ON DETAINERS, THE CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND AGAINST DOUBLE JEOPARDY, THE GOVERNMENT'S GUIDELINES AGAINST MULTIPLE PROSECUTIONS FOR THE SAME OFFENSE AND THE LEGISLATIVE INTENTION OF 18 U.S.C. §924.

This Court is faced squarely with the issue of whether it will approve a successive indictment which the government admits was "simply a device for circumventing the strictures of the Interstate Agreement on Detainers" (gov't's memorandum in opposition to defendant's motion to dismiss 76 Cr. 1076 at p. 16). The United States Attorney's position is that the IAD, legislation which the Department of Justice recommended to the 90th Congress (United States v. Mauro, Docket Nos. 76-1251, 1252, denied October 26, 1976, slip. op. at 274-75), "safeguards no substantial rights of a prisoner that could not be protected through less drastic means...[and] is deemed sufficiently trifling" that now the government "see[s] nothing wrong with an attempt to avoid" its "heavy consequences" (Id. at 16-17).^{*} Appellant submits, as this Court held in Mauro, supra, at 275, that if the government does not like the law which it supported into enactment, their recourse is not subversion and manipulation of the pleading process, but Congressional repeal. "Any other construction would permit the United States

^{*} See United States v. Mauro at 272-273 and United States v. Ford, infra, at 1688-1694 for this Court's contrary understanding of the value and purpose of the IAD.

to evade and circumvent the Agreement by simply utilizing" the process of successive indictment for the same transaction. United States v. Mauro, supra at 272. This, we submit is an abuse of prosecutorial discretion and a deprivation of due process of law.

For almost four years, the government held appellant under prosecution on indictment 73 Cr. 319 which charged him with aiding and abetting a bank robbery under 18 U.S.C. §§2113(a)(b) and (d). During that period, with full knowledge of the applicability of the IAD, they three times brought him to the Southern District and returned him to State custody before the completion of the prosecution, on at least one of those occasions over his expressed protest. Then, one month after this Court decided United States v. Mauro, in October, 1976, appellant having moved the preceding August for dismissal on the basis of the District Court opinion in Mauro,* the government brought what they called a "supplemental" indictment, 76 Cr. 1076, charging conspiracy to violate 18 U.S.C. §2113 and carrying a firearm during the conspiracy in violation of 18 U.S.C. §924. This Court is not confronted with the question of violation of the IAD, because the government has conceded that, and the District Court "dismissed the 1973 indictment on the ground that the government had failed to comply with the IAD, as construed by the Court of Appeals in Mauro" (United States v. Cumberbatch, S.D.N.Y., December 16, 1976, Palmieri, J., slip op at 4). The government did not appeal the dismissal of the 1973 indictment, but rather elected to proceed to trial on the second indictment, the District

* The motion was timely having been made prior to trial (Rule 12) F.R. Crim. P., and the Agreement requires no written request for the invocation of Article IV(e), and this Court has entertained its invocation for the first time on appeal. United States v. Cyphers, Docket Nos. 76-1131, 1160 (2d Cir. 2-8-77) slip. op. at 1744-45.

Court having reserved decision on appellant's pre-trial motion to dismiss it until the day the verdict was rendered. Thus, the transgression of the IAD is no longer at issue. The first indictment is not before this Court, having been dismissed on that ground and appellant having been placed in jeopardy on the second indictment. The District Court was in error, however, in holding on the one hand that the IAD and Mauro required the dismissal of the first indictment "with prejudice" (oral dismissal at p.9 of trial record), but on the other hand that, "the facts of this case suggest that this defendant should not be permitted to avail himself of the benefits of the IAD." (United States v. Cumberbatch, supra at 5). The Court's very action in dismissing the first indictment, is a concession that Mauro and the IAD were applicable to this case. If the Court had a supportable rationale for reading the law to exclude appellant from its benefits, there was simply no need to dismiss the first indictment.

Appellant submits that the Court's rationale for not dismissing the second indictment is in itself unsupported by the facts and the law. As the Statement of Facts, supra, details, there is no evidence that appellant purposely sought to delay this trial. From December 18, 1973, when the government filed its notice of readiness on the first indictment, until July 7, 1975, when the AUSA wrote the Judge seeking clarification of appellant's representation, the government did nothing to move the case; appellant was represented by the Legal Aid Society during that period. After Mr. Bloom was assigned in September, 1975, Judge Duffy was unable to try the case and Mr. Bloom was committed to other trials. In the memorandum in opposition, the government states, "Repeated delays have been caused by the trial

commitments of Cumberbatch's lawyer and by Judge Duffy's refusal to fix a trial date" (p.3) In April, 1976, when a June 7 date for trial was fixed, Mr. Bloom immediately informed the Court and the AUSA that he would be on trial on that date and he requested the date be moved up to mid-May and the case be assigned to a new Judge, as it ultimately was, if Judge Duffy could not try it. Mr. Bloom did not request, nor was there apparently any opposition to, an adjournment sine die on July 13, 1976, when Mr. Bloom was on trial. In fact, when the June 7 date could not be met, Mr. Bloom specifically requested that appellant remain at MCC so that he could prepare for trial, a specific goal sought to be accomplished by the IAD (United States v. Ford, infra, at 1693-94). This request was opposed by the AUSA and the Court denied it, and appellant was once again sent back to the Auburn State Prison. If the AUSA and the Court were concerned about an imminent trial, they could well have kept appellant in the Southern District and seen to it that trial preparation proceed with or without Mr. Bloom as counsel. No suggestion was ever made to appellant that at some point he would forfeit his rights under the IAD if he insisted on Mr. Bloom as counsel. There was never a suggestion throughout this history, nor could it be suggested now, that Mr. Bloom was misrepresenting to the Court his prior trial commitments. Without evidence of such misrepresentation, the Court's opinion that "Cumberbatch has repeatedly obstructed the 'expeditious and orderly disposition' of this case," is totally unfounded, (United States v. Cumberbatch, supra, at 6) "The Government here impugns [Mr. Bloom's] integrity as a member of the Bar and officer of the Court based purely on conjecture" (United States v. Grasso, 76-1284, 2d Cir. 3-9-77).

Furthermore, nothing in this history suggests that at the times the government ordered appellant's presence in the Southern District, the trial was imminent; evidence a cavalier disregard for the purposes of the IAD. The first writ of habeas corpus ad prosequendum by its own terms ordered,

immediately after the said Victor Cumberbatch shall have pleaded to said indictment, that you return him to the said New York City Correctional Institution.*

The second writ was for the purpose of a conference to clarify appellant's representation. No trial date was set. Appellant was told, not asked, at that September 9, 1975, conference that he would be returned to the State. All these writs were filed at the exparte instance of the AUSA, and, as with the third writ, appellant's own request to remain for trial was denied and his return was in the hands of the Court and the AUSA.

This Court held in Mauro that there are no exceptions to the IAD requirements of no return until trial, that overcrowding at MCC is specifically not an excuse (as offered by the AUSA as grounds for refusing the June, 1976, request that he stay), and that the benefits of the IAD are not waived by the simple accession to being sent back (slip. op. at 270 n.3, 271 n.6). Indeed, this Court held that there was no intentional relinquishment of a known right by a defendant who had requested a return to the sending jurisdiction (Mauro at 270 n.3, but cf. United States v. Ford, Docket No. 76-1319, 2d Cir. 2-3-77). Here there was certainly no such request, and if there is any fault for the trial delay which has a bearing on the application of the IAD and appellant submits it has no bearing, it must fall on the Court and the AUSA. The Speedy Trial Rules and Plans developed in recent years

* The government did not even file its notice of readiness until after this writ was satisfied.

by this Court and the District place that responsibility on the Court and the AUSA. United States v. Didier, ____ F.2d ____ (2d Cir. decided October 13, 1976) (Responsibility for an adjournment sine die, which is in itself improper, rests with government; express waiver of rights and benefits necessary; failure to demand after adjournment sine die, no waiver); United States v. Vispi, Docket No. 76 -1250, 2d Cir. decided 11-15-76; United States v. Salzmann, Docket No. 76-1357 (2d Cir. 9-28-76).

There is no escaping the conceded reason and purpose for permitting the second indictment in this case notwithstanding the IAD mandated dismissal with prejudice of the first. The District Court said it plainly: "the defendant is correct in asserting that the Government's purpose in reindicting Cumberbatch was to salvage its prosecution in the face of the Mauro holding." (United States v. Cumberbatch, supra, at 5). This is precisely the kind of manipulation of process forbidden to the government if dismissal with prejudice is to have any meaning. Here the second indictment was brought one month after Mauro when appellant had moved to dismiss the first on Mauro grounds; the judicial imprimatur of this procedure under these circumstances is akin to the situation where, "a judge exercises his authority to help the prosecution at a trial in which its case is going badly, by affording it another more favorable opportunity to convict the accused." Gori v. United States, 367 U.S. 364, 369 (1961). Although the dismissal of an indictment is not a double jeopardy attaching act, the dismissal "with prejudice," as mandated by the IAD (United States v. Ford, supra, at 1701) must have at least the same effect. This Court held in Hilbert v. Dooling, 476 F.2d 355 (2d Cir. 1973) (en banc), in implementing its own Speedy Trial Plan, which did not even include the words "with prejudice" in its sanction, that reindictment would be precluded as if those words did appear in the Plan. And there, the second

indictment included a conspiracy charge not present in the first indictment: "the addition of a conspiracy count based on essentially the same transaction would not appear to be legally significant for the purpose of determining whether the charge should be dismissed under Rule 4 of the Prompt Disposition Rules" 476 F.2d 355, 357 n.5. In referring to this decision and reaffirming its holding, this Court said,

This decision was but a reflection of the understanding that the Rules would stand for nothing if a dismissal for failure to comply with them would merely lead to re-indictment...[it] would also provide an incentive for devious behavior by Assistant United States Attorneys pressed with heavy caseloads and an institutional disfavor with having cases dismissed.

United States v. Flores,
501 F.2d 1356, 1359 n.3
(1974)

Although the Speedy Trial Plans later adopted by the Districts specifically avoided "with prejudice" dismissals under certain circumstances, the decisions in Flores and Hilbert do explain unequivocally what "with prejudice" means: a subsequent prosecution for the same offense is barred. White v. United States, 377 F.2d 948 (D.C. Cir. 1967); United States v. Oppenheimer, 242 U.S. 85 (1916); See United States v. Cyphers and Jerro, Docket Nos. 76-1131, 1160 (2d. Cir. 2-8-77) slip. op. 1745-46 (a second indictment for a different transaction "did not violate the Agreement"); United States v. Crutch, 461 F.2d 1200, 1202 (2d Cir. 1972) cert. den. 409 U.S. 883,

Nor does the government escape the "with prejudice" bar, by naming different statutes in its new indictment. Besides the purpose destructive of the IAD which should bar the withholding "for a rainy day" of charges arising out of the same transaction (Hilbert v. Dooling, supra), the analogous double jeopardy law, and the supervisory powers

of this Court and the Justice Department's own guidelines condemn the procedure. Appellant was charged in the first indictment with bank robbery and aiding and abetting and the use of firearms. He was charged in the second indictment with conspiracy to commit the bank robbery and using a firearm during it. We submit that only by a contorted and microscopic semantic analysis could anything like separate offenses be adduced here that would resemble the traditional distinctions that have in the past saved successive prosecutions. The same evidence that would have been offered to prove appellant's aiding and abetting a bank robbery in the first indictment, was used to prove the conspiracy in the second. United States v. Sabella, 272 F.2d 206 (2d Cir. 1959). Furthermore, "it would be highly questionable to prosecute a conspiracy charge in addition to, and separately from, any substantive offense committed as part of the conspiracy." United States v. Jacobson, Docket No. 76-1345. (2d Cir. 12-17-76) slip. op. at 1025; Maraker v. United States, 370 U.S. 723 (1962); Petite v. United States, 361 U.S. 529 (1960).

No new evidence concerning the firearm was required on the second indictment, because the first indictment also specifically charged the use of a firearm during the commission of the robbery. Since the robbery and the conspiracy in both indictments are proved by exactly the same evidence, there is no significant distinction between the indictments simply because one charges use of the weapon in aiding and abetting a robbery and the other use of the weapon in a conspiracy to rob. Furthermore, 18 U.S.C. §2113(d), has no element unique to it, not present among the elements of 18 U.S.C. §924, and therefore, under the traditional test for successive prosecutions, the latter was an invalid "broadening" of charges. United States v. Grady and Jankowski,

Docket Nos. 76-1201, 1208 (2d Cir. 10-27-76) (second indictment for same transaction after statute of limitations has run and while first indictment is outstanding, permitted only if charges are not broadened); Green v. United States, 355 U.S. 184 (1957); Blockberger v. United States, 284 U.S. 299, 304 (1932). The fact that 18 U.S.C. §924 carries a lesser penalty than §2113(d) is not significant; it is the additional charge with additional elements (if that be maintained as to §924), after one prosecution for the same transaction has been dismissed with prejudice that is significant for these purposes, not the penalty but the successive prosecution itself after a dismissal with prejudice of an essentially lesser included offense. Indeed, the apparent paradox of the lesser penalty with the additional element of proof in §924,* indicates that §924 was not meant to apply to the use of firearms in a bank robbery under 2113(d) which carries a much higher penalty on the lesser proof of a dangerous weapon. Indeed, this is the holding of the Eighth Circuit in United States v. Eagle, 539 F.2d 1166 (1976), which barred prosecution under §924 for acts embodied in other federal criminal statutes which already provide additional penalties for the use of a gun; 18 U.S.C. §2113 was specifically cited as an example of the latter. The government has sought to escape the intended application of §924, which would preclude the second indictment for yet another reason, by arguing that "no previous authority...shared its [Eagle's] conclusion, and no Court has subsequently adopted its reasoning," which relied on the clearly stated legislative intention expressed by the statute's sponsor, Representative Poff (gov't's memorandum in opposition to

* Although 2113(d) does not specifically require proof of a firearm, the prosecutor in this case chose to so specify the dangerous weapon in the first indictment.

dismissal of 76 Cr. 1076 at p. 13). The government has overlooked this Court's decision in United States v. Ramirez, 482 F.2d 807, 813 (2d Cir. 1973)), which preceded Eagle and specifically approved and made use of the legislative intention of §924 as expressed by Representative Poff. See Simpson v. United States, Docket Nos. 76-5761, 5796 cert. gtd. U.S.S.Ct 4-18-76. To hold otherwise in face of a clearly announced legislative intention, and a statutory structure which reflects that intention, would be to construe §924 into surplusage. United States v. Blascus, 397 F.2d 203, 207 n.9 (2d Cir. 1968). The government knows this, hence their abstention from charging §924 in the first indictment. They concede that they are using §924 here purely as an alternative to salvage a prosecution, not its intention by anybody's definition. As the AUSA wrote below, "Indeed, were Indictment 73 Cr. 319, which does charge a violation of that statute [2113], not vulnerable to dismissal, no prosecution under 18 U.S.C. §924(c)2 could have been brought" (gov't's memorandum at pp. 14-15).* The evil of misapplying the statute is no less because it is done in a successive prosecution rather than in a single indictment including both 2113 and 924 charges. The misapplication remains for the purposes already discussed, and the fact is that appellant has been prosecuted for both offenses; here the insignificant difference is that the prosecutor lost one of them.

There are supposed to be government guidelines and a government policy, supported by this Court, against multiple pro-

* Apparently prosecutions have been brought and convictions obtained on simultaneous charges of 2113 and 924 (gov't's memorandum at pp.13-14), but nobody raised the issue in those cases.

secutions for the same offense. United States v. Cioffi, 487 F.2d 492 (2d Cir. 1973), and double jeopardy and collateral estoppel have barred them as they should here. United States v. Sabella, supra; Ashe v. Severson, 397 U.S. 436 (1970); Gori v. United States, supra; Blackledge v. Perry, 417 U.S. 21, 27-29 (1974). This Court has in other contexts held the government to its own guidelines and monitored the prosecutorial power to ensure adherence to the law and to avoid approving the contrary (United States v. Jacobs, Docket No. 75-1319 (2d Cir. 12-30-76); United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972), and we submit it should do so in this case. In United States v. Gerard, the defendant had been indicted for conspiracy and counterfeiting and he pleaded guilty. The plea of guilt was withdrawn prior to sentencing, and the government brought a second indictment adding a charge of \$924. The Ninth Circuit reversed and dismissed the 924 count after trial, conviction, and the imposition of consecutive sentences: "Having in mind that he [the prosecutor] knew all the facts from the outset, the breakdown in the agreement seems scarcely a new reason for not including the count initially" 491 F.2d 1300, 1306 (1974). We ask the same result here for both counts of the second indictment.

POINT II

SINCE THE GOVERNMENT'S EVIDENCE THAT APPELLANT CARRIED A FIREARM WAS INCOMPLETE AND INSUFFICIENT AND SINCE NO EVIDENCE WAS INTRODUCED TO SHOW UNLAWFULNESS UNDER A CITY ORDINANCE OR THAT THE BANK WAS FEDERALLY INSURED ON THE DAY OF THE ROBBERY, THE CONVICTION MUST BE REVERSED.

The government failed to adduce competent evidence sufficient to prove beyond a reasonable doubt that the instrument depicted only in a photograph as carried by the robber alleged to be appellant was a

weapon...which will or is designed to or may readily be converted to expel a projectile by the action of an explosive.

18 U.S.C. §921(3)(A)

Appellant was furthermore deprived of a fair jury determination of the issue when the Court asked the expert witness if he could say the instrument in the photograph was not capable of firing (279-280), when the Court permitted a lay witness to characterize the gun as a sub-machine gun (182) and when the Court charged the jury,

These guns were used. Randall said that he was pistol whipped and struck with the barrel of his carbine* while on the floor...You are entitled to infer that the weapon was a firearm from all the surrounding circumstances, including the use and the appearance of the weapon...the government does not have to prove that the gun was operable...I have in my hands exhibit 54, which shows one of the robbers in profile, holding, extending the gun. You can see the whole contour of the gun in this photograph.

(535-536).

Appellant submits that since §§921 and 924 contain no presumption that what appears to be a firearm in bank surveillance photographs is such as defined by those sections, the Court's question to the expert of whether he could say the gun was not operable shifted a burden of establishing the firearm to appellant to disprove it, and that the expert's opinion that it "appeared"

* A misstatement of Mr. Randall's testimony. Randall did not see who or what hit him the second time after Mr. Washington struck him (234-244).

to be a firearm (267) was speculative, was based on an assumption of the ultimate fact that it was a firearm, and was unqualified to the extent that Mr. Scroggie's expertise lay in the handling and classification of actual weapons, not on photographic comparisons. F.R, Evid. 702, 703. Furthermore, the opinion that this particular weapon was "designed" to fire a projectile was itself an inference based on the inference that the unseen, untouched instrument from "the appearance of the photograph" was the weapon he said he thought it appeared to be (276-277).*

No case under §§924, 921 has ever gone to a jury or resulted in a conviction based on such speculation where the instrument in question was not seen or handled at some time by someone familiar with weapons. cf. United States v. Liles, 432 F.2d 18 (9th Cir. 1970). This Court has reversed a judgment in a civil case based on testimony of experts who themselves had not had the opportunity to examine the instruments in question. J. Gerber and Co. v. SS Sabine Howalt, 437 F.2d 580, 593-394 (2d Cir. 1971) (boat hatches on the issue of leakage); See also Logsdon v. Baker, 517 F.2d 174 (D.C. Cir. 1975); Hoffman v. Sterling Drug, 485 F.2d 132 (3rd Cir. 1973); Lashley v. Ford Motor, 359 F. Supp. 363 (D.C. Ga. 1972) affd 480 F.2d 158 cert. den. 414 U.S. 1072. Since the necessary quantum of proof is so much greater in a criminal case, all the more unsatisfactory is the evidence here to sustain a conviction. There was no evidence that the instrument was in fact a firearm,

* Mr. Scroggie contradicted himself testifying at one point that the instrument was capable of firing a projectile (268), and then that he didn't know it was so capable (280-281). This uncertainty reflects the speculative nature of his opinion.

only that it "appeared to be a firearm, and that if it was, it was designed to fire a projectile. This testimony did not add to the proof or aid the jury in its determination, because, without Mr. Scroggie, the jury looking at the photographs could well say the instrument "appeared" to be a firearm. Mr. Scroggie did not say it was impossible or even improbable that it was a replica of a gun, only that he had never seen such a replica. This testimony, we submit, does not prove beyond a reasonable doubt that a real firearm was involved. Mr. Scroggie's opinion, analyzed, is based on the assumption of the very fact sought to be proved, that the instrument in the photograph is a gun. "[A]n opinion is no better than the hypothesis or the assumption upon which it is based." International Paper v. United States, 227 F.2d 201, 205 (5th Cir. 1955); United States v. Spaulding, 293 U.S. 498, 506 (1935).

Even if the testimony be accepted as competent and sufficient to support a jury verdict, the Court foreclosed a fair jury verdict by the comments and rulings which in effect charged the jury there was a real gun in those photographs. United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); Quercia v. United States, 289 U.S. 466 (1933); United States v. Arango, 539 F.2d 287 (2d Cir. 1976); United States v. Natale, 526 F.2d 1160 (2d Cir. 1975).

The government failed in the second element of the crime under §924, the "unlawfulness" of the possession of the firearm, and the Court again supplied the verdict to the jury with its charge, "you may conclude that the possession of this particular...firearm was possessed unlawfully..." (537) on the basis of section 436-6.6 of the Administrative Code of New York City. The Court was incorrect because that ordinance, as cited in the Court's charge, forbade

carrying a long gun without a general permit for the carrying of long guns, and the government did not offer evidence of the absence of a general permit. Here the only evidence was a stipulation that appellant had not been issued a permit to carry the specific long gun named by Mr. Scroggie. There was no evidence that appellant had not been issued a general permit, the only kind of permit which the ordinance prescribes. It was, of course, not his burden to prove the general permit, and the government's failure in this respect voids the conviction.

This Court has rejected prosecutor's arguments that they should somehow be absolved from directly proving certain elements of certain crimes, that Courts and juries can infer these proofs from facts and circumstances making the absence of the ultimate fact "most unlikely." United States v. Robinson, Docket No. 76-1214 (2d Cir decided 11-10-76). United States v. Profaci, 274 F.2d 289, 291-292 (2d Cir 1960). The elements here in §§921 and 924 are statutorily mandated and must be proved beyond a reasonable doubt. United States v. Ramirez, 482 F.2d 807 (2d Cir. 1973); Perkins v. United States, 526 F.2d 688 (5th Cir. 1976).

Unfortunately, the Statute under which the government chose to bring this prosecution required more, and on that additional element the government failed - and totally failed - to prove its case. Our system of administering justice requires that a defendant, no matter how guilty he may be of some crime, cannot be convicted unless there is proof beyond a reasonable doubt that he committed a particular crime with which he is charged.

United States v. Tavoularis,
515 F.2d 1070, 1077
(2d Cir. 1975)

In this context appellant also argues that the government failed to introduce competent evidence of the FDIC with respect to the bank at the time of the robbery. United States v. Hamilton, 452 F.2d 472, 479 (8th Cir. 1972); Kane v. United States, 431 F.2d 172, 175-76 (8th Cir. 1970).

POINT III

PROSECUTION UNDER INDICTMENT 76 Cr. 1076 VIOLATED THE PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES AND APPELLANT'S RIGHTS TO A SPEEDY TRIAL AND DUE PROCESS OF LAW

Since the government was not ready for trial on indictment 76 Cr. 1076, until 3 years after appellant's "arrest" on these charges, the arrest determined by the date he "appears" before a judicial officer in connection with a federal charge," in this case October, 1973. (Plan for Prompt Disposition of Criminal Cases of the Southern District §§3b,7), and since, "any indictment or information subsequently filed in connection with such charge" is governed by that initial date (Plan §§3a, 5(d)5), and since the government's neglect was not excusable, indictment 76 Cr. 1076 must be dismissed with prejudice (Plan §11(c)). The District Court was not vested with discretion to refuse to dismiss the indictment under these circumstances and under these sections of the Plan, because, by its own terms, Plan §11(e) does not apply. The District Court also violated §11(c) when it reserved decision on appellant's pre-trial motion to dismiss and held it until after the trial.

Although all the charges in the second indictment grew

out of the same transaction and all the facts concerning the charges were known when the "arrest" was made and the first indictment filed, this indictment was not filed and the government was not ready on it until November, 1976, well beyond the 60 days after July 1, 1976, required by the Plan §3(a). The reasons for the government's late readiness* on the second indictment is that they had no intention of filing it until their violation of the IAD caused the first indictment to be "vulnerable." Thus, since the second indictment was an afterthought designed to circumvent the IAD by the use of charges withheld which could have been brought at the time of the original indictment, the delay in readiness on the second indictment can hardly be countenanced as "excusable" under the Plan (See Point I, supra).

Furthermore, between October, 1973, when appellant was arraigned on the first indictment, and May, 1975, when the government sought to bring him to trial with his co-defendant Estremara, at a time when appellant was on trial in State Court, the government apparently did nothing to move the case. Appellant's unavailability at the time of the Estremara trial, did not deter the government from going ahead with Estremara alone, and the same could have been done with appellant's case in that year and half hiatus, if Estremara was unavailable (and there are no facts in the record supporting a claim of Estremara's unavailability). Appellant was represented by the Legal Aid Society throughout that period.

* Under Plan §7, "readiness" is not measured by the existence of indictment. The government obviously may not delay indictment and then argue they couldn't be ready on what they didn't have.

Then, after May, 1975, the government acceded to delays caused at least in part by Judge Duffy's inability to schedule the case, despite the Plan's requirement that

The United States Attorney will familiarize himself with the scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce it is ready for trial.

(§5(f)2),

and despite counsel's request in April, 1976, that another Judge be assigned for trial for mid-May. That this could have been done is evidenced by the fact that it was finally done sometime in the fall of 1976, just prior to trial. Recent cases in this Court have held the United States Attorney to these responsibilities, despite attempts to place the onus on defense counsel, who, as the record of this case reveals, was otherwise legitimately engaged when the case was scheduled without his participation after September, 1975 and who made every effort to move the case when he was not. United States v. Didier, ___ F.2d ___ (2d Cir. 10-13-76); United States v. Vispi, Docket No. 76-1250 (2d Cir. 11-15-76); United States v. Salzmann, Docket No. 76-1357 (2d Cir. 9-28-76).

Other violations of the Plan did occur, but are governed by the Plan §11(e) discretionary, dismissal sanction. The second indictment was required to be filed by September 1, 1976, under Plan §§3(a) and (b). The Court below was incorrect that Rule 5(d)5 absolves the prosecutor of bringing subsequent indictments for the same offense within the 60 day time limits of §§3(a) and (b). Section 5(d)5 specifically reads to the contrary, requiring the subsequent indictment to be filed "without regard to the existence

of the original indictment," therefore the time of "arrest" governs as it would if no previous indictment existed. This result is completely consistent with the guidelines against multiple prosecutions discussed in Point I, supra. Appellant submits that because this particular violation of the Plan, as well as those already discussed, were caused by inaction of the United States Attorney over a 3 year period, and are sought to be excused in order to circumvent his violation of the IAD during that period, to fail to dismiss the second indictment under Plan §11(e) is an abuse of discretion, violation of appellant's Constitutional rights to a Speedy Trial, in contravention of 18 U.S.C. §§3161-63, and F.R. Crim. P. 48(b), and due process of law.

POINT IV

APPELLANT WAS DEPRIVED OF A FAIR TRIAL, THE RIGHTS TO CROSS-EXAMINATION AND TO PRESENT A DEFENSE, BY PREJUDICIAL, RESTRICTIVE RULINGS BY THE TRIAL JUDGE, BY THE GOVERNMENT'S WITHHOLDING OF RELEVANT EVIDENCE, BY REMARKS OF THE JUDGE DEPRECATING COUNSEL AND THE DEFENSE AND BY THE COURT'S CHARGE TO THE EFFECT THAT THE PROSECUTION HAD PROVED ITS CASE.

In addition to the other errors made by the Court as described in the preceding points, the Court's questions and rulings supporting the \$924 charge, and the Court's unfounded interpretation of Mr. Bloom's role in the pre-trial delay, and the refusal to rule on appellant's pre-trial dismissal motion until after verdict, appellant submits that he was deprived of a fair trial by the Court's demonstrated attitude of hostility toward the defense and its support of the prosecution throughout

the trial. Specifically assigned as error in this respect are the following:

1. Permitting over objection what the Court called "peripheral" testimony by Mr. Randall concerning the extent of his injuries and the medical treatment he was receiving, obviously meant to prejudice the jury against appellant (238);
2. Announcing in open court that reports used by counsel to impeach government witnesses were provided to the defense by the government for purpose of cross-examination and were not admissible in evidence (245);
3. Precluding counsel from cross-examining FBI Agent McCartin on his bias and motivation (311-328), interrupting counsel's opening statement and admonishing him in front of the jury that such a defense was "entirely out of order" (169-170), and the Court's then taking over of the examination of the witness to elicit denials of any such motivation (328-329), and the later charge to jury which in effect negated that defense (548-551);*
4. Ordering defense counsel not to say "good morning" to witnesses and ordering him not to "demonstrate amusement" in the courtroom (320-321);
5. Instructing the United States Attorney on how to try the case for the government, specifically warning him that defense counsel had made a "good point" on the FBI Agent's report naming a different automobile as the place where the newspaper was found, specifically instructing the AUSA to "clear up" the point lest the jury be affected (324);
6. Charging the jury that they should not be "diverted"

* See specifically the Court's rhetorical questions, ie, "did Janson and McCartin have some way outside the FBI office of determining" prints (551, 550-551).

by counsel's argument that appellant's prints on one of the newspapers may have gotten there by an innocent reading of the newspaper which contained a story of major national interest, the Ellsberg case (556-557);

7. Charging the jury that the case was a "mosaic" of pieces which formed a pattern once the jury stood back from it and that they should conduct their deliberations by building from one "undisputed" fact to another and then deal with the "troublsome" facts (560-561); and

8. Admonishing defense counsel during his and the prosecutor's summations, rebuking counsel for objections to the latter and for argument in the former and on one occasion remarking in front of the jury, "you are not helping anybody except to keep us all here without any purpose" (411, 418, 426, 446, 474-475, 476-477).

The Court's impatience with the case (607-608), and with the points raised in the course of counsel's zealous advocacy, and its apparent conviction of appellant's guilt, unfortunately spilled over into the nature of its rulings and apparent demeanor and attitude in open court. The Court became in effect an advocate for the prosecution thus depriving appellant of an impartial trial. United States v. Grunberger, 431 F.2d 1062 (2d Cir. 1970); United States v. Nazarro, 472 F.2d 302 (2d Cir. 1973); United States v. Natale, 526 F.2d 1160 (2d Cir. 1975); United States v. Carter, 528 F.2d 844 (8th Cir. 1975); United States v. Aranjó, 539 F.2d 287 (2d Cir. 1976); Quercia v. United States, 289 U.S. 466 (1973)

The law is well settled that the behavior and bearing of a judge during a jury trial must be such that the entire trial will be

conducted in a general atmosphere of impartiality.

United States v. Cassiagnol,
420 F.2d 868, 878 (4th Cir. 1970)

See also Young v. United States, 346 F.2d 793 (D.C. Cir. 1965);
United States ex rel Bloeth v. Denno, 313 F.2d 364 (2d Cir. 1963)
cert. den. 372 U.S. 978; Rosen v. Sugarman, 357 F.2d 794 (2d Cir.
1966).

Specifically with respect to Agent McCarten's cross-examination and the defense that he was biased and fabricating, it was not the province of the trial judge to remove this issue from the jury and to deprecate it to the point of accusing the defense of "irresponsible" advocacy. It was up to the jury to decide if the Agent was lying and covering up on the basis of the contradictory report of the location of the newspaper, and the contradictory testimony that the agent played no role in the case beyond finding it, given his later admissions that he first secured a search warrant and then that he executed it, all denied by the Agent. The defense had the Constitutional rights of cross-examination and defense, to elicit the bias of a witness and any possible fabrications, and the Court's restrictions in this area and its rulings and charges which negated that defense deprived appellant of a fair trial. Davis v. Alaska, 94 S.Ct. 1105 (1974); United States v. Gonzalez, 488 F.2d 833 (2d Cir. 1973); United States v. Barash, 365 F.2d 395 (2d Cir. 1966); In the Matter of Contempt Proceedings v. Williams, Docket No. 73-2697 (2d Cir. 1-10-75); United States v. Haggett, 438 F.2d 396 (2d Cir. 1971) cert. den. 402 U.S. 946; United States v. Dellinger, 472 F.2d 340 (7th Cir. 1972).

Prejudice toward a group of which defendant is a part may be a source of partiality against the defense. He is therefore entitled to a reasonable opportunity to cross-examine witnesses as to the existence of any prejudice and its possible effect upon their testimony.

United States v. Kartman,
417 F.2d 893, 897
(9th Cir. 1969)

The Court's justification for the preclusion of cross-examination erroneously misconstrued the issue, which was not whether appellant was in fact a black militant against whom the Agent was therefore biased. The issue was whether this was the Agent's perception of appellant and his associations. The bias would be just as relevant if the agent's subjective perceptions were that appellant was a black militant, whether appellant was or was not in fact a black militant.

The Court compounded the error here by unnecessarily admitting into evidence the tags attached to the newspaper placed on it by the fingerprint examiner, Mr. Jenkins. Mr. Jenkins did not find the newspaper and his label of the location was hearsay and he had no idea from what source the information came. It prejudiced appellant, because these tags seemed to corroborate the location of the newspaper in the Oldsmobile used in the robbery, rather than a Buick that was not. United States v. Frattini, 501 F.2d 1234 (2d Cir. 1974). It was also prejudicial error to refuse to permit defense counsel to see the FBI file, which apparently did contain the search warrant returns, showing that, contrary to his testimony, Agent McCartin executed a search warrant in this case and made an inventory of his findings. Counsel

ultimately discovered this information and his motion for a new trial should have been granted. United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974); United States v. Seijo, 514 F.2d 1357 (2d Cir. 1975).

Appellant submits that the "mosaic" charge was in effect a charge that the prosecution had proved its case, and as such requires reversal of the conviction. United States v. Grunberger, supra.

POINT V

THE IN-COURT IDENTIFICATION WAS UN-NECESSARILY AND IMPERMISSABLY SUGGESTED AND IRREVOCABLY TAINTED BY ALLOWING IT, OVER APPELLANT'S OBJECTION, WITHOUT AN IN-COURT LINE-UP, BY THE PRIOR SHOWING OF THE BANK SURVEILLANCE PHOTOS, AND BY THE PRE-TRIAL EXHIBITION OF APPELLANT'S PHOTOGRAPH.

The only witness to identify appellant as one of the robbers was the bank manager James Bolla. This in-court identification was, however, impermissably suggested by the in-court show-up conducted over appellant's objection and despite appellant's request for an in-court line-up, and by the pre-trial suggestive procedure of displaying first the bank surveillance photographs before the photospread containing appellant's picture. Mr. Bolla saw the man in the robbery he identified as appellant for only 30 seconds and he gave conflicting descriptions to the FBI (see Statement of Facts, supra). Under these circumstances, to ask him to make an in-court identification of the robber almost four years later, while appellant was sitting in the courtroom, without

a line-up of reasonably resembling alternatives, was to tell him to identify appellant. Foster v. California, 394 U.S. 440 (1969). The Due Process Clause forbids line-ups or, as in this case, show-ups, that are unnecessarily suggestive (Stovall v. Denno, 388 U.S. 293), and, since appellant requested the line-up prior to trial, there was no "necessity" for refusing his request and submitting him to an in-court show-up. Whatever delay might have been occasioned in the proceedings, was far outweighed by the prejudice of the show-up, and since other prosecution witnesses were available, there was time to arrange the line-up before Mr. Bolla had to testify before the jury.

The line-up here was all the more important, because Bolla's identification had already been impermissably suggested when he was first shown the bank surveillance photos before the photospread containing appellant's picture in 1973. His identification at that time in 1973 could well have been based on the surveillance photos, rather than on any actual recollection of what he had personally seen. United States v. Evans, 484 F.2d 1178 (2d Cir. 1973). Then, he was shown appellant's photograph at least three times prior to the trial, the last time a week before the trial, so he knew by that time the face he was supposed to pick in Court. United States v. Daily, 18 Cr. L. 2166 (8th Cir. 10-22-75). The in-court line-up requested by appellant might have neutralized the taint already implanted in Bolla, but certainly without it, the identification was a product of the whole chain of suggestion culminating in the identification at the in-court show-up.

Appellant was further prejudiced by the prosecutor's remark

to the jury that appellant could have been seated anywhere in the courtroom. This remark capitalized on the denial of the line-up and was an unfair comment given the well-recognized necessity of a minimum six to eight reasonable look-alikes to make a non-suggestive identification. Sitting somewhere in the courtroom other than counsel table would not change the suggestive procedures if nobody there resembled appellant.

Appellant submits further that he was deprived of potentially exculpatory material by the failure of the government to preserve the full photospread shown to Mr. Bolla and the statement made by Bolla upon picking appellant's photograph. Brady v. Maryland, 373 U.S. 83 (1963).

POINT VI

SINCE APPELLANT'S DECISION NOT TO TESTIFY WAS BASED ON THE PROSECUTOR'S PERMITTED USE, OVER HIS OBJECTION, OF A PRIOR CONVICTION THAT HAS SINCE BEEN REVERSED AND DISMISSED, AND SINCE HIS SENTENCE WAS BASED ON THAT CONVICTION AND OTHER IMPROPER CRITERIA, THE JUDGMENT SHOULD BE REVERSED OR THE SENTENCE REMANDED FOR RECONSIDERATION

In sentencing appellant, the Court stated it was denying him Youthful Offender treatment because this crime was a very serious crime.

It's [sic] defendant's propensity for violence was evident not only by this crime, but by his state conviction.

(640-641)

Appellant submits that the Court employed improper criteria in denying him Youthful Offender treatment and that since his State conviction, upon which the Judge relied, has been reversed, the

sentence should be vacated and remanded to another Judge for re-sentencing. Mawson v. United States, 463 F.2d 29 (1st Cir. 1972); United State v. Brown, 470 F.2d 285 (2d Cir. 1972). The Youth Corrections Act by its own terms and intention does not preclude its treatment to those convicted of violent crimes, and the Court may not make a general exception not provided in the law to these otherwise eligible for the treatment. United States v. Howard, 449 F.2d 1086 (D.C Cir. 1971). And, the mere fact of a prior record or experience with regular, adult prison program is not sufficient to support a finding of "no benefit" under the Act. United States v. Riley, 481 F.2d 1127 (D.C. Cir. 1973).

Appellant submits further that the maximum 15 year sentence on both counts imposed by the Court was not individual to appellant but was imposed (a) to conform as closely as possible to the sentences imposed on his co-indictees in the same bank robbery (who received sentences of 18 years, and about whom the AUSA argued here, "Mr. Cumberbatch has already benefitted substantially from the dismissal of the first indictment, and now faces a maximum exposure of less time than any of his three co-defendants received" (631); (b) as punishment for bank robbery, a crime for which he was not charged in the instant indictment, and as a punishment for having obtained dismissal of that bank robbery charge (North Carolina v. Pearce, 395 U.S. 711); and (c) because the Court felt the statutory penalties for conspiracy to rob a bank should be greater ("conspiracy to commit a bank robbery should carry a much higher maximum penalty, certainly much higher than the other count" (644-645). That the Court here never really considered sentence

alternatives for appellant is evidenced by its desire, expressed on the record, to sentence him the day after the verdict without a probation report (591-592).

Thus, the sentence imposed was an abuse of discretion based not on the individual before the Court, but on the nature of the offense charged for which the Court wished to impose greater penalties, United States v. Daniels, 446 F.2d 967 (6th Cir. 1971); United States v. McCoy, 429 F.2d 739 (D.C. Cir. 1970); Woolsey v. United States, 478 F.2d 139 (8th Cir. 1973, en banc); United States v. Baker, 487 F.2d 360 (2d Cir. 1973), and on the sentences imposed on co-defendants and on charges dismissed.

Since appellant's motion to have the prosecutor precluded from using the 1975 State conviction, on appeal at the time, against him in cross-examination was either denied or never decided, and since that conviction has since been reversed and dismissed, appellant was improperly precluded from testifying and the judgment should be reversed. Since the Court relied on appellant's State conviction for robbery for which he was sentenced there to 8 1/2 to 25 years, and since that conviction has been overturned and the indictment dismissed, at the very least, the Court relied on what is now misinformation and on an invalid prior conviction. For these reasons a remand and resentencing is mandated. United States v. Tucker, 404 U.S. 443 (1971); Townsend v. Burke, 334 U.S. 737 (1947); United States v. Malcolm, 432 F.2d 809 (2d Cir. 1970).

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED WITH PREJUDICE OR, IN THE ALTERNATIVE A NEW TRIAL ORDERED, OR THE CASE SHOULD BE REMANDED FOR RESENTENCING.

Respectfully submitted,

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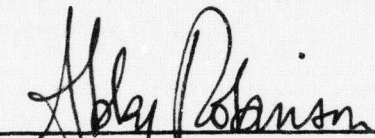
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STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

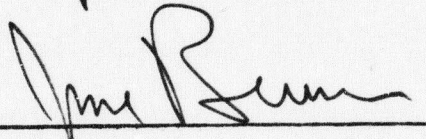
ABBY ROBINSON, being duly sworn, deposes
and says: deponent is not a party to the action, is over
18 years of age and resides at 34 White St.

On April 25, 1977, served the within
Appellate Brief & Appendix
upon Robert B. Fiske, Jr. attorney
for Appellee in this action, at

1 St. Andrew's Plaza
NY, NY 10007
the address designated by said attorney(s) for that purpose
by depositing a true copy of same enclosed in a post-paid
properly addressed wrapper, in ~~an~~ ^{an} ~~post office~~ official
depository under the exclusive care and custody of the
United States Postal Service within the State of New York.


ABBY ROBINSON

Sworn to before me on
April 25, 1977.



JESSE BERMAN
Notary Public, State of New York
No. 31-5290718
Qualified in New York County
Commission Expires March 30, 1978